Nos. 80-1801 and 81-91

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80-1808 IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED CONTRACTORS OF AMERICA, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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ARGUMENT

This brief responds to the Brief For The National Labor Relations Board In Opposition filed in No. 80-1808 and relied on by the Board as its brief in opposition in No. 81-91.

The Board's brief simply repeats in summary form the four principal arguments made in its brief in opposition to the certiorari petition in the *Shriver* case:[1] (1) that union signatory subcontractor clauses are proviso-protected because they are needed in the construction industry for "maintaining wage levels" and "protecting benefits" (Board br 8); (2) that "immense practical problems" would attend a rule that confined union signatory clauses to circumstances where jobsite friction could arise (Board br 9); (3) that the § 8(e) proviso was "intended to preserve the pattern of collective bargaining" in existence in 1959 (Board br 7); and (4) that *Connell*[2] merely fills a "loophole" in § 8(b)(7), which would otherwise permit unlimited picketing, and so *Connell* does not apply when a "collective bargaining relationship" is present because then picketing is limited by § 8(b)(7) and thus no "loophole" is present (Board br 9-11).

Our certiorari petition in No. 81-91 and our supporting brief in No. 80-1808 confront directly each of these arguments made by the Board in *Shriver* and explain the serious shortcomings in the Board's analysis and the Board's serious misrepresentations of the law. Significantly, in its opposing brief herein the Board has elected to respond to these deficiencies in its position *by simply ignoring them.*

1. ***Complete protection of union wages and benefits can be accomplished by a primary union standards clause, without need for a subcontractor clause that forces subcontractors' employees to join the union.*** The Board argues here, just as it did in *Shriver,* that "the union members' interest in their employer's subcontracting practices goes well beyond the

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[1] *Donald Shriver, Inc. v. NLRB,* 635 F2d 859 (D.C. Cir 1980), cert den ___ US ___ (May 1, 1981) (Supreme Court docket No. 80-1257).

[2] *Connell Co. v. Plumbers Steamfitters,* 421 US 616 (1975).

narrow concern" of avoiding jobsite friction between union and nonunion workers, and because of the peculiarity of the construction industry, requires union signatory subcontractor clauses for "maintaining union wage levels" and "protecting benefits" (Board br 8, quoting opinion below). This latter interest, the Board argues, warrants the extension of proviso-protection to subcontractor clauses that do not serve to prevent jobsite friction and that do serve to force employees to accept union representation regardless of their wishes.

As we pointed out in our petition and our supporting brief, this argument ignores the settled doctrine that a union can protect its economic standards through a union standards subcontractor clause, which is primary and therefore needs no proviso-protection. By forbidding an employer to subcontract to a firm that does not meet union standards such a clause removes the incentive to subcontract as a means for undermining union standards; a general contractor bound by such a clause must assure that, whether he performs the work on his own or through a subcontractor, the employees are paid at the union standards level.

Through this primary, lawful device, union economic standards are protected without any violation of § 8(e) and without any employee being forced to join a union against his wishes.

The clause at issue here goes far beyond assuring that union wage and fringe benefit levels are maintained; it requires in addition that the subcontractor abide by all *noneconomic* provisions of the union's contract, including the union security clause, which requires all subcontractors' employees to join the union. Thus, this subcontractor clause forces employees of subcontractors to join the union whether they want to or not, in derogation of their rights of free choice protected by § 7 of the

Act.[3] This compulsory unionism is in no way required to serve the union's interest of "maintaining wage levels" and "protecting benefits" (Board br 8, quoting from opinion below), since those interests can be fully served by a union standards subcontractor clause. Nor does this compulsory unionism serve to avoid union-nonunion friction on the jobsite, since it is not confined to jobs where such friction can occur. Instead this compulsory unionism serves only to organize employees from the top down, contrary to Congress' "major aim" (*Connell*, 421 US at 616) of preventing such union tactics.

In its brief here the Board simply repeats the sweeping generalities of its *Shriver* brief and makes no attempt to come to grips with the fact that this clause's devastating effect on § 7 rights is wholly unnecessary to protect union standards. The Board's resort to conclusional assertions cannot mask the glaring flaws in its logic. Nor can the Board avoid this fundamental point by ignoring it.

2. *The jobsite friction rule does not require jobsite-by-jobsite negotiation of labor contracts and is readily administered under familiar NLRB principles*. The Board's argument here that a jobsite friction rule would generate "immense practical problems" simply repeats what it said in *Shriver* without addressing the deficiencies in that argument explained in our petition and brief. The Board persists in its baseless claim that a jobsite friction rule would necessitate "jobsite-by-jobsite negotiation of collective-bargaining contracts" (Board br 9). There is nothing in the jobsite friction rule that would force or even encourage construction unions and employers to abandon

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[3]Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

their present practice of negotiating wages, benefits, subcontracting restrictions and other terms of employment for a term of years and instead negotiating such terms separately for each job. The subcontracting clause in such a long-term agreement would apply only on those jobs where friction is a possibility.

The Board also repeats its argument that a jobsite friction clause would be difficult for unions to enforce; it makes no mention of the fact, explained in our petition and brief, that for decades the NLRB has permitted unions to picket construction jobsites only when employees of a primary employer are present[4] and thus has made the legality of such picketing turn on the presence or absence of particular employees on the jobsite, precisely the test required by the jobsite friction rule. The Board makes no effort to explain why the use of this test in determining the legality of a subcontractor clause presents "immense practical problems" when the same test has been used successfully for so many years in determining the legality of picket lines.

3. *The Board's "pattern of bargaining" argument is contrary to* Connell. The Board asserts as dogma, with no analysis, that the construction proviso was intended to preserve the 1959 pattern of bargaining (Board br 7), without even mentioning that the *Connell* Court dismissed this same argument, and without even mentioning the Board's earlier position that clauses of the type held illegal in *Connell* were a consistent and regular part of the 1959 "pattern" that the Board claims is preserved in the proviso (see our petition for certiorari, pp 9-10).[5] The Board's argument that all clauses which "were part

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[4]E.g. *Carpenters' Council of Milwaukie*, 196 NLRB 487, 490, No 60 (1972); *Local U. No. 519, United Ass'n of J. A. of Plumb., Etc. v. NLRB*, 416 F2d 1120, 1124-1126 (D.C. Cir 1969).

[5]The Board's General Counsel's acknowledgment that clauses of the type held illegal in *Connell* were "commonplace" in 1959 (see our petition for certiorari, pp 9-10) belies the unsupported assertion of the respondent unions that such clauses were "an entirely novel organizing device" with "no antecedent in the construction industry at the time of the 1959 amendments" (Mem for Resp Unions in Opp 3, note 3).

of that pattern" were preserved (Board br 7) is thus directly contrary to *Connell's* striking down of a clause that was part of that very pattern.[6]

4. Connell *is not a mere plug in a "loophole" in § 8(b)(7) but a bar to all top-down-organizing subcontractor clauses.* Finally, the Board repeats its argument that *Connell* merely closed a narrow loophole in § 8(b)(7) that left "stranger" unions free to picket employers to obtain subcontracting agreements. It fails even to address the legal principles which we discuss in our petition and brief showing that this claimed "loophole" for stranger unions is fictitious; in fact, § 8(b)(7) imposes no effective restraints on any union efforts to obtain subcontractor clauses, and this is so regardless of whether or not the picketing union is a "stranger." A union recognized by an employer can picket that employer indefinitely to force it to sign a union signatory subcontractor clause without violating § 8(b)(7) or any other provision. A union which has not been recognized can consistent with § 8(b)(7) engage in "informational picketing" indefinitely even though its ultimate objective is to force the employer to sign an agreement containing a union signatory subcontractor clause (see our certiorari petition, pp. 15-16).

Thus, whether or not "a collective bargaining relationship" exists, § 8(b)(7) does not effectively limit picketing to obtain subcontractor clauses; it follows that *Connell* cannot fairly be viewed as a mere plug for a supposed "loophole" in that statute. Its significance is broader. The ruling in *Connell* and the fair import of its language create a far more significant obstacle to such picketing than is raised by § 8(b)(7). Because under *Connell* union signatory subcontractor clauses that do not prevent jobsite friction violate § 8(e), picketing to obtain such a clause violates § 8(b)(4)(A).[7] Thus *Connell's* significance is not

[6]The respondent unions argue that the dissent below acknowledges that Senator Kennedy thought that the proviso would permit union signatory subcontractor clauses (Mem for Resp Unions in Opp 2, note 3), but the unions omit the dissent's conclusion that "most congressmen thought the proviso was intended to address the problems of jobsite friction" (Pet App in No. 80-1808, p 102).

[7]Section 8(b)(4)(A) prohibits picketing to secure a clause prohibited by § 8(e).

the mere plugging of a supposed loophole in § 8(b)(7), but instead the imposition of § 8(b)(4)(A) as a barrier to picketing intended to secure top-down-organizing subcontractor clauses.

The Board's brief studiously avoids meeting any of these points, which were all specifically addressed in our petition and supporting brief. Apparently the Board believes that its *Shriver* brief is a "winning formula" and that the best strategy in this case is to repeat the *Shriver* formula and ignore all contrary authority.

All agree that these issues are of vital importance to the entire construction industry. The only basis the Board urges for denying certiorari is that the majority's decision below was correct. Yet the Board has not even dared address any of the reasons we have set forth showing that the majority's decision is based on serious misstatements of basic labor law—misstatements which, we submit, the Board cannot defend so has elected to ignore. To ignore brings ignorance and prevents the full airing of issues required to assist this Court in ruling on questions of the magnitude of those presented by the petitions herein.

We urge that the Board's *Shriver* brief and its brief here rest on unsound legal premises, that for the reasons stated in our petition and supporting brief the Ninth Circuit's decision is contrary to *Connell*, and that certiorari should be granted to review these questions which all concede are of vital and far-reaching importance to construction industry labor relations.[8]

Respectfully submitted,
James H. Clarke
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[8]The list of related companies of the petitioner herein, required by Rule 28.1 of the Rules of the Supreme Court of the United States, is set forth in footnote 1 of the petition in No. 81-91.